No. 21A_____

IN THE

Supreme Court of the United States

BST HOLDINGS, LLC ET AL.

V.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR

ON EMERGENCY APPLICATION FOR WRIT OF STAY
FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Brett M. Kavanaugh, Associate Justice
and Circuit Justice for the Sixth Circuit

EMERGENCY APPLICATION FOR WRIT OF STAY

RELIEF REQUESTED BY 2:00 P.M. ON DECEMBER 20, 2021

Daniel R. Suhr
Counsel of Record
M. E. Buck Dougherty III
Liberty Justice Center
141 W. Jackson Blvd., Ste. 1065
Chicago, IL 60604
Telephone: 312-637-2280
dsuhr@libertyjusticecenter.org
bdougherty@libertyjusticecenter.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: 504-952-8016
sarah@pelicaninstitute.org

Attorneys for Petitioners BST Holdings, LLC; RV Trosclair L.L.C.; Trosclair Airline LLC; Trosclair Almonaster LLC; Trosclair and Sons LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton LLC; Trosclair Claiborne LLC; Trosclair Donaldsonville, LLC; Trosclair Houma LLC; Trosclair Judge Perez LLC; Trosclair Lake Forest LLC; Trosclair Morrison LLC; Trosclair Paris LLC; Trosclair Terry LLC; Trosclair Williams LLC; Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; and Kip Stovall

[additional counsel on next page]

Matthew R. Miller
Robert Henneke
Chance Weldon
Nate Curtisi
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701
(512) 472-2700
Attorneys for Burnett Specialists; Choice Staffing, LLC; Staff Force Inc.; and LeadingEdge Personnel, ltd.

Gene P. Hamilton
Vice President & General Counsel
America First Legal Foundation
300 Independence Avenue SE
Washington, D.C. 20003
(202) 964-3721
R. Shawn Gunnarson
Kirton McConkie
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
Additional Counsel for LeadingEdge Personnel Services, Ltd.

December 18, 2021

QUESTION PRESENTED

Did the Occupational Safety and Health Administration ("OSHA") exceed its lawful authority by issuing an Emergency Temporary Standard that mandates vaccination policy for all workplaces with at least 100 employees?

PARTIES

Applicants BST Holdings, LLC, RV Trosclair L.L.C., Trosclair Airline LLC, Trosclair Almonaster LLC, Trosclair and Sons LLC, Trosclair & Trosclair, Inc., Trosclair Carrollton LLC, Trosclair Claiborne LLC, Trosclair Donaldsonville, LLC, Trosclair Houma LLC, Trosclair Judge Perez LLC, Trosclair Lake Forest LLC, Trosclair Morrison LLC, Trosclair Paris LLC, Trosclair Terry LLC, and Trosclair Williams LLC (the "Trosclair Companies") are privately owned companies whose principal place of business is in the state of Louisiana. BST Holdings, LLC is the management company for the other entities, which are individual grocery stores.

Applicants Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; and Kip Stovall (the "CaptiveAire Employees") are natural persons and citizens of the State of Texas (collectively, "BST Applicants").

Applicants Burnett Specialists; Choice Staffing, LLC; Staff Force Inc.; and LeadingEdge Personnel, ltd., are privately owned companies whose principal place of business are all in the state of Texas.

The following petitioners are parties to the proceedings below but are not parties to this Emergency Application: Republican National Committee; United Food and Commercial Workers,

AFL-CIO; American Federation of Labor and Congress of Industrial Organizations; National Association of Home Builders of the United States; Massachusetts Building Trades Council; Local 32BJ, Service Employees International Union; AFT Pennsylvania; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; Associated General Contractors of America, Inc.; American Road and Transportation Builders Association; Signatory Wall and Ceiling Contractors Alliance; American Family Association, Inc.; Word of God Fellowship, Inc., d/b/a/ Daystar Television Network, Inc.; State of Texas; HT Staffing, Ltd., d/b/a HT Group; State of Louisiana; Cox Operating, L.L.C; DIS-TRAN Steel, LLC; DIS-TRAN Packaged Substations, LLC; Beta Engineering, LLC; Optimal Field Services, LLC; State of Mississippi; Gulf Coast Restaurant Group Inc.; State of South Carolina; State of Utah; Texas Trucking Association; Mississippi Trucking Association; Louisiana Motor Transport Association; American Trucking Associations, Inc.; National Federation Of Independent Business; National Retail Federation; FMI – The Food Industry Association; National Association Of Convenience Stores; National Association Of Wholesaler-Distributors; International Warehouse & Logistics Association; International Foodservice Distributors Association; Greg Abbott; Bentkey Services, LLC, d/b/a/ The Daily Wire; Phillips Manufacturing & Tower Co.; Sixarp, LLC; Commonwealth of Kentucky; State of Idaho; State of Kansas; State of Ohio; State of Oklahoma; State of Tennessee; State of West Virginia; Answers in Genesis, Inc.; Southern Baptist Theological Seminary; Asbury Theological Seminary; Tankcraft Corporation; Plasticraft Corporation; State of Indiana; Job Creators Network; Independent Bankers Association; Lawrence Transportation Company; Guy Chemical Company, LLC; Rabine Group of Companies; Pan-O-

Gold Baking Company; Terri Mitchell; State of Missouri; State of Arizona; State of Nebraska; State of Montana; State of Arkansas; State of Iowa; State of North Dakota; State of South Dakota; State of Alaska; State of New Hampshire; State of Wyoming; AAI, Inc.; Doolitttle Trailer Mfg., Inc.; Christian Employers Alliance; Sioux Falls Catholic Schools d/b/a Bishop O'Gorman Catholic Schools; Home School Legal Defense Association, Inc.; DTN Staffing Inc. ; Jamie Fleck; Sadie Haws; Sheriff Sharma; Wendi Johnston; Miller Insulatioj Company; Brad Miller; Corey Hager; Julio Hernandez Ortiz; Aaron Janz; MFA Incorporated; MFA Enterprises, Inc.; Missouri Farm Bureau Services, Inc.; Missouri Farm Bureau Insurance Brokerage, Inc.; MFA Oil Company; Doyle Equipment Manufacturing Co.; Riverview Manufacturing, Inc.; National Association of Broadcast Employees & Technicians—The Broadcasting & Cable Television Workers Section of the Communications Workers of America, AFL-CIO, Local 51; Media Guild of the West, The News Guild-Communications Workers of America, AFL-CIO, Local 39213; Union of American Physicians and Dentists; The Denver Newspaper Guild, Communications Workers of America, Local 37074, AFL-CIO; State of Florida; State of Alabama; State of Georgia; Georgia Highway Contractors Association; Georgia Motor Trucking Association; Robinson Paving Co.; Scotch Ply-wood Company, Inc.; The King 's Academy; Cambridge Christian School; FabArc Steel Supply, Inc.; Tony Pugh; Associated Builders and Contractors, Inc.; and Associated Builders and Contrac-tors of Alabama, Inc.

The Respondent is the Occupational Safety and Health Administration, the agency the United States Department of Labor responsible for the challenged order.

The following respondents are parties to the proceedings below but are not parties to this Emergency Application: United States Department of Labor; Marty Walsh, United States Secretary of Labor; Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health; James Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health; Joseph R. Biden, President of the United States; and the United States of America.

RULE 29.6 STATEMENT

As required by Supreme Court Rule 29.6, Applicants hereby submit the following corporate-disclosure statement.

1. Applicants have no other parent corporation.

2. No publicly held corporation owns any portion of Applicants, and Applicants are not a subsidiary or an affiliate of any publicly owned corporation.

DECISIONS BELOW

The related proceedings from the courts below are:

BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 2021 U.S. App. LEXIS 33698, 2021 WL 5279381 (5th Cir. Nov. 12, 2021) (order granting the stay), ("*BST Holdings*") filed concurrently as Appendix A.

In re: MCP No. 165, Occupational Safety and Health Administration, Interim Final Rule: Covid-19 Vaccination and Testing; Emergency Temporary Standard 86 Fed. Reg. 61402, 2021 U.S. App. LEXIS 37024, (6th Cir. Dec. 15, 2021) (order denying initial hearing en banc) ("*MCP No. 165 En Banc*"), filed concurrently as Appendix B.

In re: MCP No. 165, Occupational Safety and Health Administration, Interim Final Rule: Covid-19 Vaccination and Testing; Emergency Temporary Standard 86 Fed. Reg. 61402, (6th Cir. Dec.17, 2021) (order dissolving the stay) ("*MCP No. 165 Panel*"), filed concurrently as Appendix C.

JURISDICTION

Applicants have a pending challenge to the agency's order in the U.S. Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 2112(a). This Court has jurisdiction under 28 U.S.C. § 1651.

Furthermore, "decisions of this Court 'have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . . Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action . . . .'" *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (quoting *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 671, n.22 (1963)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

APPLICATION

To the Honorable Brett M. Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Sixth Circuit:

The Applicants, businesses and employees who will be subject to the Occupational Safety and Health Administration's unlawful vaccination mandate (the "Mandate") (filed concurrently as Appendix D), respectfully ask this Court to grant them an emergency stay while they litigate the legality of this unprecedented executive action. Without relief, enforcement of the Mandate will begin January 4, 2022, and its negative effects have already begun.

This Court should grant emergency relief because it is faced with the equivalent of a circuit split on one of the most important, pressing issues facing Americans today.[1] Eighty-four million Americans[2] are subject to the Mandate. The Fifth Circuit and the Sixth Circuit reached opposite conclusions on whether Applicants are deserving of a stay of the Mandate. This Court should side with the Fifth Circuit and exercise caution by issuing a stay to preserve the status quo until briefing on the merits can occur. No one should be forced to take a vaccine against his or her will until this legal question can be sorted out.

INTRODUCTION

In an attempt to impose a nationwide COVID-19 vaccine mandate without approval from Congress, the executive branch couched its mandate as an emergency workplace rule affecting

---

[1] In this rare instance, one circuit court essentially can overrule another because the Court of Appeals has original jurisdiction to review an OSHA ETS and may issue a stay, 29 U.S.C. § 655(f), and because the Judicial Panel on Multidistrict Litigation consolidates multiple challenges into one circuit court of appeals with the power to vacate any earlier stays, 28 U.S.C. § 2112(a).

[2] *See* 86 Fed. Reg. 61,468.

nearly 100 million Americans. But the rule is neither a workplace rule nor responsive to an emergency. Vaccination is a public health issue that affects people throughout society; it does not combat a hazard particular to the workplace. And there is no need to avoid administrative accountability by using an emergency rule to address a pandemic that has been ongoing for over two years. Congress did not grant the Occupational Safety and Health Administration ("OSHA") such sweeping powers in its authorizing statute. And if it had, such authority would violate the U.S. Constitution.

FACTUAL BACKGROUND

In On September 9, 2021, President Joe Biden held a press conference in which he stated that his "patience is wearing thin" with unvaccinated Americans, and he announced a package of COVID-19 vaccine mandates covering nearly 100 million Americans.[3]

The chosen tool for imposing the broadest vaccine mandate possible was to "frame [it] as an ETS" (Emergency Temporary Standard) promulgated by OSHA. *BST Holdings*, 2021 WL 5279381, at *6. After many publicly questioned whether OSHA had such power, President Biden explained that he was "moving forward with vaccination requirements wherever [he] can."[4]

Nearly two months later, OSHA published the "emergency" standard in the Federal Register. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402

---

[3] Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates That Could Cover 100 Million Americans,* CNN (Sept. 9, 2021, 9:01 P.M.), https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html.

[4] Robert Towey, *Biden Says Unvaccinated Americans Are 'Costing All of Us' as He Presses Covid Vaccine Mandates,* CNBC (Sept. 24, 2021, 11:12 A.M.), https://www.cnbc.com/2021/09/24/biden-says-unvaccinated-americans-are-costing-all-of-us-as-he-presses-covid-vaccine-mandates.html.

(Nov. 5, 2021). The Mandate requires all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis and wear a face covering while at work. *Id*. at 61,402-04.

The OSHA rule is one of five COVID-19 vaccine mandates announced by President Joe Biden on September 9, 2021, all of which relied on novel, questionable views of executive authority.[5] To date, six different courts have issued seven different decisions examining those mandates and found that the executive branch agencies charged with enforcing them did not possess the statutory or constitutional authority to do so. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 2021 U.S. App. LEXIS 33698, 2021 WL 5279381 (5th Cir. Nov. 12, 2021) (staying the OSHA mandate); *Georgia v. Biden*, No. 1:21-cv-00163 (S.D. Ga. Dec. 7, 2021) (enjoining the federal contractor mandate), aff'd *Georgia v. Biden*, No. 21-14269 (11th Cir. Dec. 17, 2021); *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021) (same); *Louisiana v. Becerra*, No. 3:21-cv-03970-TAD-KDM, 2021 U.S. Dist. LEXIS 229949 (W.D. La. Nov. 30, 2021) (enjoining the healthcare workers mandate), aff'd *Louisiana v. Becerra*, No. 21-30734, 2021 U.S. App. LEXIS 37035 (5th Cir. Dec. 15, 2021); *Missouri v. Biden*, No. 4:21-cv-01329-MTS, 2021 U.S. Dist. LEXIS 227410 (E.D. Mo. Nov. 29, 2021) (same), aff'd *Missouri v. Biden*, No. 21-3725, Dkt. 5107268 at 1 (8th Cir. Dec. 13, 2021). Only one court to address

[5] *See* Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/. The others are mandates on federal employees, federal contractors, Head Start workers, and healthcare workers.

the merits had declined to issue an injunction. S*ee Florida v. HHS*, No. 21-14098-JJ, 2021 U.S. App. LEXIS 35998 (11th Cir. Dec. 6, 2021) (healthcare workers mandate); *see also Florida v. HHS*, No. 3:21cv2722-MCR-HTC, 2021 U.S. Dist. LEXIS 224264, at *11 (N.D. Fla. Nov. 20, 2021) (declining to enjoin because of insufficient irreparable injury, without addressing the likelihood of success on the merits). The Sixth Circuit below broke with this line of authority, vacating the stay entered by the Fifth Circuit Court of Appeals. Without relief from this Court, Applicants will be subjected to an unlawful vaccine mandate that has no basis in congressional authority granted to OSHA and violates core constitutional principles.

PROCEDURAL HISTORY

On November 5, 2021, BST Applicants brought a Petition against the Mandate [5th Cir., No. 21-60845] and an Emergency Motion to Stay Enforcement Pending Review & Expedite Review, seeking relief the next day. Burnett Specialists, Choice Staffing, Staff force, and LeadingEdge (collectively, the "Staffing Agencies") brought a Petition against the Mandate and a Motion for Stay Pending Review on November 5, 2021. On November 6, 2021, the Fifth Circuit granted the stay, citing "grave statutory and constitutional issues" and ordering expedited briefing. Applicants represent all the parties to the litigation who requested and were granted the initial stay.[6] After briefing, the Fifth Circuit entered its 22-page order upholding the stay requested in the two petitions pending adequate judicial review of the motions for a permanent injunction. *See* Appendix A.

[6] For this reason, Applicants have joined to file one Application on behalf of the parties whose Fifth Circuit stay was vacated by the Sixth Circuit and who request that it be reinstated.

Concurrently, dozens of other petitions were filed in circuit courts around the country. The filing of petitions in multiple circuits triggered the lottery process required by 28 U.S. Code § 2112(a)(3), by which the Judicial Panel on Multi-District Litigation assigns all such petitions to a single circuit via process of random selection. Via this procedure, the Sixth Circuit was selected, and Applicants' Petitions and all others were transferred there for further proceedings.

On November 17, 2021, some petitioners filed a petition for initial hearing en banc, and other petitioners later joined or filed their own such petitions.

On November 23, 2021, OSHA filed a motion with the Sixth Circuit to dissolve the stay entered by the Fifth Circuit.

On December 15, 2021, the entire 6th Circuit Court of Appeals deadlocked and issued an opinion denying the en banc request, with 8 judges joining in two dissenting opinions that argued against the Mandate on the merits. *See* Appendix B.

On December 17, 2021, the Sixth Circuit panel granted OSHA's motion to dissolve the stay. *See* Appendix C.

STANDARD OF REVIEW & STATEMENT OF EXIGENCY

When deciding whether to issue a stay, "a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987));

see also Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 66 (2020) (citing *Winter v. NRDC, Inc.*, 555 U. S. 7, 20 (2008)).

This case is one where the law is clear, and the timeliness is critical. As the Fifth Circuit found, OSHA's unprecedented claim of authority cannot be squared with the operative terms of the authorizing statute—and as the Fifth Circuit recognized in dicta, OSHA's power grab likewise runs afoul of basic guarantees of our constitutional structure. Timing is likewise crucial here because, without this Court's intervention, Applicants will be subject to this unlawful order in the coming days, rendering it vital that this Court preserve the status quo.

ARGUMENT

First, the balance of the harms favors granting a stay in this case. This Court is faced with the equivalent of a circuit split on one of the most important, pressing issues facing Americans today. The Fifth Circuit and the Sixth Circuit reached opposite conclusions on whether Applicants are likely to succeed on the merits of their claim that the Mandate exceeds OSHA's statutory and constitutional authority. When faced with two competing circuit court rulings regarding the likelihood of success on the merits, this Court should exercise caution by granting a stay to preserve the status quo until briefing on the merits can occur. Failing to reinstate the Fifth Circuit stay would cause irreparable harm to Applicants and the public, but reinstating it would not harm OSHA.

Second, this Court should side with the Fifth Circuit that Applicants are likely to succeed on the merits of their claim that the Mandate exceeds OSHA's statutory authority. The Mandate is not related to the workplace; it does not address a "grave danger"; it is not "necessary"; and it does

not address a "toxic or physically harmful" "substance" or "agent." Therefore, this Court should reinstate the Fifth Circuit preliminary stay.

Third, this Court should issue a stay because the Mandate violates the U.S. Constitution because it violates both the Commerce Clause and the nondelegation doctrine. The Sixth Circuit's interpretation of the statute fails to comply with or even try to apply *United States v. Morrison,* 529 U.S. 598 (2000) or *United States v. Lopez*, 514 U.S. 549, 608 (1995), which properly limits Congress's authority to regulate noneconomic activity under the Commerce Clause. In fact, not only does the panel decision fail to apply the *Morrison/Lopez* test, its analysis relies entirely on pre-1980 case law. Further, OSHA's breathtaking interpretation of the ETS statute fails to comply with the nondelegation doctrine because it provides no legislative policy nor boundaries to which the Executive must conform.

I. The balance of the harms cautions granting a stay in this case.

A. Given the split among the circuit courts, this Court should maintain the status quo prior to the issuance of the Emergency Temporary Standard.

Two different circuit courts have reached opposite conclusions on whether Applicants are likely to succeed on the merits of their claim. "Given the split among the Circuits, it is at least hard to say that [one party's] reading of the statute is demonstrably wrong. At minimum, there are arguments on both sides." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2492 (2021) (Breyer, J., dissenting) (cleaned up). Because there are arguments on both sides, this Court should exercise caution and "return[ ] to the status quo" until the issue can be briefed below on the merits. *Nken v. Holder*, 556 U.S. 418, 429-30, 129 S. Ct. 1749, 1758 (2009). In a different vaccine mandate case,

the Fifth Circuit did just that because "preserving the status quo 'is an important' equitable consideration in the stay decision." *Louisiana v. Becerra*, No. 21-30734, at *4 (5th Cir. Dec. 15, 2021) (upholding lower court injunction of the healthcare vaccine mandate) (quoting *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978)).

In this case, maintaining the status quo means returning the parties to their status before the Mandate was issued on November 5, 2021, or stopping the Mandate preliminarily because "the Secretary's vaccine rule has not gone into effect." *Louisiana*, No. 21-30734, at *4. "[T]he 'status quo' refers to the legally relevant relationship between the parties before the controversy arose." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060-61 (9th Cir. 2014). It does not refer to the situation prior to the Fifth Circuit stay but to the situation prior to the OSHA ETS: "The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (cleaned up). In other words, "the last uncontested status preceding the current controversy is the status quo that existed prior to the implementation of the Rule." *Centro Legal de la Raza v. Exec. Office for Immigration Review*, 524 F. Supp. 3d 919, 951 (N.D. Cal. 2021). Thus, the Court should return the parties to their state prior to the implementation of the Mandate by issuing a stay in this case.

B. Without a stay, the CaptiveAire Employees would suffer irreparable harm.

The decision to receive a COVID-19 vaccine is a deeply personal healthcare decision that is made for life. If this Court does not stay the Mandate, OSHA will coerce workers like the CaptiveAire Employees to receive the COVID-19 vaccine against their will, and that action cannot be

undone. Dailey Decl., Emer. Mot. Ex. C, ¶¶4, 6-7 (5th Cir., No. 21-60845); Gamble Decl., Emer. Mot. Ex. D, ¶¶4, 6-7 (5th Cir., No. 21-60845); Jones Decl., Emer. Mot. Ex. E, ¶¶4, 6-7 (5th Cir., No. 21-60845); Loschen Decl., Emer. Mot. Ex. F, ¶¶5-6 (5th Cir., No. 21-60845); Reyna Decl., Emer. Mot. Ex. G, ¶¶4, 6-7 (5th Cir., No. 21-60845); Stovall Decl., Emer. Mot. Ex. H, ¶¶6-7 (5th Cir., No. 21-60845); Luddy Decl., Emer. Mot. Ex. I, ¶¶4-8 (5th Cir., No. 21-60845). Therefore, it constitutes irreparable harm. The Sixth Circuit panel ignored the harm to these workers in its focus on employers.

Alternatively, the Mandate would force many workers to quit their jobs, and this harm, too, is irreparable. *See* Dailey Decl. ¶8; Gamble Decl. ¶8; Jones Decl. ¶8; Loschen Decl. ¶7; Reyna Decl. ¶8; Stovall Decl. ¶8; Luddy Decl. ¶¶ 6,11. It could take weeks or months for these workers to find suitable employment at a company with fewer than 100 employees. If the Mandate were later enjoined on the merits, there would be no going back. They would be stuck with their new employers with no way to redress any harm they had suffered in switching jobs. Therefore, this Court should issue a stay to avoid forcing these workers to make "a choice between their job(s) and their jab(s)." *BST Holdings*, 2021 WL 5279381, at *24.

Those who remained in their job and remained unvaccinated also would face irreparable harm. They would be subjected to needless hours of weekly testing that will invade their privacy and cannot be undone. Dailey Decl. ¶¶6-7; Gamble Decl. ¶¶6-7; Jones Decl. ¶¶6-7; Loschen Decl. ¶¶5-6; Reyna Decl. ¶¶6-7; Stovall Decl. ¶¶6-7. Mandated testing constitutes an invasion of privacy, and for that reason this Court has enjoined even "relatively noninvasive" drug testing for political

candidates. *Chandler v. Miller*, 520 U.S. 305, 318 (1997). Invasions of privacy constitute irreparable harm because they "cannot be undone by monetary relief." *Deerfield Medical Center v. Deerfield Beach*, 61 F.2d 328, 338 (5th Cir. 1981). As the Fifth Circuit held in this case, "the loss of constitutional freedoms 'for even minimal periods of time . . . unquestionably constitutes irreparable injury.'" *BST Holdings*, 2021 WL 5279381, at *24 (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Therefore, the harm the CaptiveAire Employees face is irreparable.

C. Without a stay, the Trosclair Companies and the Staffing Agencies would suffer irreparable harm.

The Trosclair Companies and the Staffing Agencies already face a shortage of full-time employees in their workplaces, and the Mandate would make it even harder to hire and maintain employees because many of them do not want to be forced to receive the COVID-19 vaccine or be subjected to weekly testing. Trosclair Decl., Emer. Mot. Ex. B, ¶¶4, 11–13 (5th Cir., No. 21-60845). As a result, "the ETS [would] substantially decrease the workforce, drastically reduce their ability to serve the public, make it exponentially harder to hire the new employees they need, and put them at a competitive disadvantage to corporations with fewer than 100 employees, who will not be subject to the ETS." *Id*. ¶15.

The harm to the Trosclair Companies of losing current and future workers would be irreparable. They would lose sales and customers because they could not stock their shelves. *See* Trosclair Decl., ¶¶11–14; *see also MacGinnite v. Hobbs Group, LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005) (unquantifiable lost business opportunities constitute irreparable harm). They would be placed at a competitive disadvantage against smaller grocers and convenience stores not subject to the Mandate. *See* Trosclair Decl., ¶15; *see also Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d

389, 411 (9th Cir. 2015) ("A rule putting plaintiffs at a competitive disadvantage constitutes irreparable harm."). They would face compliance costs setting up a human-resources system to ask employees about vaccination status, enforce the mask mandate, and collect weekly test results. *Texas v. United States EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ("complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs") (cleaned up). Estimating the loss attributable to the Mandate versus the overall worker shortage in the economy would be almost impossible to calculate and reimburse. A "finding of irreparable harm is appropriate even where economic rights are involved when the nature of those rights makes establishment of the dollar value of the loss especially difficult or speculative." *Allied Marketing Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 810 n.1 (5th Cir. 1989) (cleaned up); *see also Heil Trailer Int'l Co. v. Kula*, 542 F. App'x. 329, 335 (5th Cir. 2013) ("An irreparable injury is . . . one for which monetary damages would be especially difficult to calculate.") (cleaned up).

Additionally, even if Applicants eventually prevail in this case, they will never be made whole. When considering harm, "it is not so much the magnitude but the irreparability that counts." *Enter. Int'l v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir.1985). The Staffing Agencies each maintain a small amount of dedicated office staff, while most of their employees are either temporary workers or "temp-to-hire" workers. *See* Decl. of D'Ambrosio (6th Cir No. 21-7000, doc. 334, Ex. 3) at ¶ 2; Decl. of Cantu (6th Cir No. 21-7000, doc. 334, Ex. 4) at ¶ 3; Decl. of Potocki (6th Cir No. 21-7000, doc. 334, Ex. 5) at ¶ 2; Declaration of Yarbrough (6th Cir No. 21-7000, doc. 334, Ex. 6). Many of these positions are entry-level, and employees are particularly mobile. Decl. of D'Ambrosio at ¶ 7; Decl. of Cantu at ¶ 5; Decl. of Potocki at ¶ 4. The

Mandate will require the Staffing Agencies to hire additional employees, divert other employees' time, create new systems, or possibly even buy expensive software to track their employees' testing and vaccination status, an administrative challenge that is only compounded by the fact that they bring in 100s of new employees every week. Decl. of Potocki ¶¶ 2, 7–8, Decl. of Yarbrough ¶ 7, Decl. of D'Ambrosio ¶¶ 5–6. Even under Respondents' estimated cost—$94 per unvaccinated employee, Resp'ts Mot. to Dissolve Stay at 44—that amount is multiple that of an entry-level employee's hourly wage. That is cost prohibitive, whether paid for by employees or employers.

Further, the Fifth Circuit correctly held that "the loss of constitutional freedoms for even minimal periods of time unquestionably constitutes irreparable injury." *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *24 (internal quotation omitted). The violation of constitutional rights alone is enough to establish irreparable injury. *See Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). "[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *N.L.R.B. v. Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring).

This is only made more important by the fact that money damages are not available in this case. "Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011). Plaintiffs are barred by sovereign immunity from collecting money damages from Respondents. *See Modoc Lassen Indian Hous. Auth. v. United States HUD*, 881 F.3d 1181, 1195 (10th Cir. 2017). Such irreparable injury will ensue without a stay from this Court.

D. A stay will further the public interest.

Without a stay, the Mandate could push millions out of the workforce and cause a massive upheaval in the American economy. The Trosclair Companies and Staffing Agencies are not alone in their shortage of workers. At the end of July, there were 10.9 million job openings in America, contrasted with 6.7 million new hires that month.[7] The Mandate would compound this problem by forcing workers to choose between leaving their jobs or having a deeply personal health decision forced upon them.

In addition, business groups have argued that, as a result of the Mandate, supply chain bottlenecks could worsen, transportation costs could soar, and the inflation of commodity prices could increase for all businesses and consumers.[8] Thus, reinstating a stay is very much in the public interest.

E. A stay would not harm OSHA.

OSHA only recently issued the Mandate for a "purported 'emergency' that the entire globe has now endured for nearly two years." *BST Holdings*, 2021 WL 5279381, at *9. Staying the Mandate until the merits are briefed will not harm OSHA. The stay does not interfere with OSHA's clearly-defined powers over workplace safety—only with novel powers that it has never before asserted.

---

[7] Bureau of Labor Statistics, Job Openings and Labor Turnover Summary, Sept. 8, 2021, https://www.bls.gov/news.release/jolts.nr0.htm.

[8] *Businesses Ask White House to Delay Biden COVID Vaccine Mandate Until After Holidays*, CNBC (Oct. 25, 2021), https://www.cnbc.com/2021/10/25/businesses-ask-white-house-to-delay-biden-covid-vaccine-mandate-until-after-holidays.html.

II. This Court should grant a stay pending review because Applicants will likely succeed on the merits that the Mandate exceeds OSHA's statutory authority.

This Court should follow the holding of the Fifth Circuit and eight judges in the Sixth Circuit and overrule the holding of the Sixth Circuit panel regarding whether that Applicants are unlikely to prevail on the merits of their claims. The Fifth Circuit correctly determined that the Mandate "grossly exceeds OSHA's statutory authority" in at least four ways: it is not related to the workplace; it does not address a "grave danger"; it is not "necessary"; and it does not address a "toxic or physically harmful" "substance" or "agent." *BST Holdings*, 2021 WL 5279381, at *9.

Congress passed the Occupational Safety and Health Act (the "Act"), 29 U.S.C. §§ 651-678, to assure safe and healthful working conditions for the nation's workforce and to preserve the nation's human resources. 29 U.S.C. § 651 (1976). The Act allows the Secretary of Labor (the "Secretary") to promulgate rules and standards for occupational safety and health, *id.* at § 655(b), but "only where a significant risk of harm exists[,] and . . . the Agency [bears the] burden of establishing the need for a proposed standard." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 652–53 (1980). A permanent standard may be issued under 29 U.S.C. § 655(b) to serve the objectives of OSHA and requires procedures similar to informal rulemaking found in the Administrative Procedure Act at 5 U.S.C. § 553.

The Secretary may bypass the normal procedure in favor of promulgating an ETS to take effect immediately upon publication in the Federal Register only if the Secretary determines that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and "that such emergency standard is necessary

to protect employees from such danger." 29 U.S.C. § 655(c)(1). An ETS serves only as a proposed rule, on which the Secretary must act within six months of publication. 29 U.S.C. § 655(c)(1).

Therefore, an ETS "'is an "extraordinary power" that is to be "delicately exercised" in only certain "limited situations."'" *BST Holdings*, 2021 WL 5279381, at *10 (quoting *In re Int'l Chem. Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987) (per curiam)). As the Fifth Circuit pointed out, "in its fifty-year history, OSHA has issued just ten ETSs. Six were challenged in court; only one survived." *BST Holdings*, 2021 WL 5279381, at *5. And OSHA has "never" before issued an ETS "to mandate vaccines." *Id*. at *28 (Duncan, J., concurring) (citing 86 Fed. Reg. at 61,403). Thus, the Mandate represents an egregious government overreach into a private healthcare decision.

A. The Mandate is not related to the workplace.

The Mandate exceeds the statutory authority given to OSHA by Congress in the Act because it is not limited to "employment and places of employment." 29 U.S.C. § 652(8). The Mandate itself admits that "COVID-19 is not a uniquely work-related hazard." 86 Fed. Reg. 61,407. Instead, the Mandate attempts to regulate a hazard one might encounter anywhere in the world. In regulating public health generally, OSHA exceeds its statutory authority. The Act was not "intended to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." *BST Holdings*, 2021 WL 5279381, at *8 (citing *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488-90 (2021) (per curiam)).

In *Alabama Association of Realtors*, this Court explained that the Centers for Disease Control and Prevention (CDC) could not unilaterally grant itself control of the nation's housing market by issuing a nationwide eviction moratorium. Sweeping authority must come, if at all, from Congress. *Ala. Realtors*, 141 S. Ct. at 2485. There, as here, the government's reading of the statute was far too expansive: "The Government contends that the [statute] gives [it] broad authority to take whatever measures it deems necessary to control the spread of COVID-19 . . . ." *Id*. at 2488. Here, the government asserts that the Act gives OSHA the power to regulate the spread of COVID-19 well beyond the workplace. In both cases, "[i]t strains credulity to believe that this statute grants the [agency] the sweeping authority that it asserts." *Ala. Realtors*, 141 S. Ct. at 2486. As the Fifth Circuit correctly analogized, "health agencies do not make housing policy, and occupational safety administrations do not make health policy." *BST Holdings*, 2021 WL 5279381, at *26 (citing *Ala. Realtors*, 141 S. Ct. at 2488-90).

The eight judges of the Sixth Circuit who joined Chief Judge Sutton's opinion dissenting from the ruling en banc agreed with the Fifth Circuit's reasoning: "It is one thing to tell a worker to don a mask at the start of a hazard-filled shift and doff it at the end. It is quite another to tell a worker to vaccinate on the basis of a risk that exists whether he is on the clock or off and that amounts to a medical procedure that cannot be removed at the end of the shift." *MCP No. 165 En Banc*, at *6, App. 032. As they concluded, "The Act does not clearly give the Secretary power to regulate all health risks and all new health hazards, largely through off-site medical procedures, so long as the individual goes to work and may face the hazard in the course of the workday." *Id*. at *6-7.

1. Workplace safety is a pretext.

The Fifth Circuit correctly recognized that OSHA's workplace vaccine mandate was being used on a "pretextual basis" for a larger goal: to increase vaccinations everywhere, and the Sixth Circuit failed to address this issue. *BST Holdings*, 2021 WL 5279381, at *15. President Biden announced the true purpose of the Mandate: "to reduce the number of unvaccinated Americans."[9] Thus, he commanded *all* unvaccinated Americans, "Get vaccinated."[10] The Mandate itself laments that "many employees have yet to take this simple step." 86 Fed. Reg. 61,444. Then it forces them to take the step by threatening loss of their jobs if they do not. *See* 86 Fed. Reg. 61,475, n.41. The Sixth Circuit panel majority erroneously framed this as "allow[ing] covered employers . . . to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces." *MCP No. 165 Panel*, at *7, App. 076. But as Judge Larsen pointed out in dissent, this gets the matter exactly backward: employers determining the best approach to their particular circumstance "was the state of federal law before the rule, not after." *MCP No. 165 Panel,* at *39, App 108 (Larsen, J., dissenting).

As the Fifth Circuit recognized, the "Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate. The vehicle it landed on was an OSHA ETS." *BST Holdings*, 2021 WL 5279381, at *9 (quoting White House Chief of Staff Ron Klain's retweet of MSNBC anchor Stephanie Ruhle's tweet stating, "OSHA doing this vaxx

---

[9] *Path Out of the Pandemic,* The White House, https://www.whitehouse.gov/covidplan/ (last visited Sept. 22, 2021).

[10] *See* Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations.").

Indeed, that the Mandate was announced as part of a larger plan to use several administrative agencies to force vaccinations on as many Americans as possible reveals its true purpose was to extend beyond the workplace. Thus, it is not surprising that three of these mandate "workaround[s]" have now been enjoined for exceeding statutory or constitutional authority. *See BST Holdings,* 17 F.4th 604 (staying the OSHA mandate); *Georgia v. Biden*, No. 1:21-cv-00163 (S.D. Ga. Dec. 7, 2021) (enjoining the federal contractor mandate); *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021) (same); *Louisiana v. Becerra*, No. 3:21-cv-03970-TAD-KDM, 2021 U.S. Dist. LEXIS 229949 (W.D. La. Nov. 30, 2021) (enjoining the healthcare workers mandate) (injunction upheld within the Fifth Circuit by *Louisiana v. Becerra*, No. 21-30734, at *4 (5th Cir. Dec. 15, 2021)); *Missouri v. Biden*, No. 4:21-cv-01329-MTS, 2021 U.S. Dist. LEXIS 227410 (E.D. Mo. Nov. 29, 2021) (same). For courts are "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). "Accepting contrived reasons [for administrative law decisions] would defeat the purpose of the enterprise." *Id*. As the Fifth Circuit said, "courts need not turn a blind eye to the statements of those issuing such pronouncements." *BST Holdings*, 2021 WL 5279381, at *14 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Thus, this Court should take President Biden at his word. His intention was to impose the Mandate "wherever [he] can,"[3] regardless of whether it involves a workplace.

2. The Sixth Circuit panel admits the Mandate extends beyond the workplace.

OSHA acknowledges the overreaching effect of the Mandate, erroneously claiming it can regulate a hazard that exists both inside and outside the workplace: "COVID-19 is not the first hazard that OSHA has regulated that occurs both inside and outside the workplace." 86 Fed. Reg. 61,407.

But it fails to acknowledge that, to be related to the workplaces covered, OSHA standards must find that the harm is *more* likely to occur there than in other places. As even the Sixth Circuit panel acknowledged, prior courts have upheld OSHA authority over hazards that are of "heightened risk" in the workplace. *MCP No. 165 Panel,* at *13, App 082. OSHA has made no such finding of heightened risk. It cannot rely merely on findings of workplace "clusters" and "outbreaks" that have occurred in certain industries. Instead, its findings must support the Mandate where it is proposed to be implemented: in workplaces with 100 or more employees and "'based upon exposure in actual levels found in th[os]e workplace[s].'" *BST Holdings*, 2021 WL 5279381, at *12 (quoting *Int'l Chem. Workers*, 830 F.2d at 371). OSHA did not make such a finding but, instead, adopted a rule that was both over- and under-inclusive. *See, infra,* at 23. Thus, the Mandate "commandeers U.S. employers" to prevent their employees from spreading COVID-19 everywhere they go, unlawfully attempting to shift to them the cost of paying for a problem throughout society. *BST Holdings*, 2021 WL 5279381, at *22. Allowing OSHA to implement standards based on dangers in society generally, rather than work-specific dangers, would be a huge shift in the law, giving OSHA far more power than Congress intended. "[H]ard hats and safety goggles, this is not." *Id*. at *23, n.20.

The Sixth Circuit panel misses the mark when it points to previous rules regarding HIV and HBV arguing that "no virus—HIV, HBV, COVID-19—is unique to the workplace and affects only workers." *MCP No. 165 Panel,* at *13, App. 082. But the question is not whether the danger only appears in the workplace, rather the question is whether the rule OSHA adopted is addressed to the workplace-specific form of the hazard. Nothing about the Mandate is limited to the workplace—neither the pathogen at issue, nor its solution. Instead of addressing the danger in the workplace, OSHA seeks to compel private medical decisions to be made *outside of work*, to prevent a disease that they could likewise catch anywhere. It reaches beyond the office and the factory and into worker's homes and doctors' offices, where Congress never intended it to go. As Judge Larsen recognized, "[a]n authority to protect 'employees' from a 'grave danger' encountered in the workplace . . . is most naturally read to place a workplace boundary on the solution." *MCP No. 165 Panel,* at *51, App. 120 (Larsen, J., dissenting).

OSHA has never attempted to implement a rule this broad. First, it has never implemented even a permanent rule regulating airborne infectious diseases. It considered doing so in 2014 but received many public comments in opposition and ultimately declined to promulgate the rule.[11]

Second, it has never mandated a vaccine: "[T]he agency has never previously used its authority to strictly mandate vaccination . . . ." 86 Fed. Reg. 61,439. The only other vaccination ever covered by an OSHA standard is its Bloodborne Pathogens standard, which mandated that employers whose workers could be exposed to blood or other potentially infectious materials at work

[11] *Regulatory Framework,* Regulations.gov (Oct. 9, 2014), https://www.regulations.gov/document/OSHA-2010-0003-0245.

offer free Hepatitis B vaccinations. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993); *see also* 29 C.F.R. § 1910.1030(f)(2)(iv). Unlike the Mandate, that rule did not require employees to be vaccinated or test negative. And that rule applied only to workers who could potentially be exposed to bloodborne pathogens in specific fields *at work*. Yet even that rule was found partially unlawful because it applied in an overbroad manner to sites not controlled either by the employer or by a hospital, nursing home, or other entity that was itself subject to the blood-borne-pathogens rule. *Am. Dental Ass'n*, 984 F.2d at 830. Thus, in the most analogous example cited by OSHA for the authority to issue the Mandate, the standard applied only to workers facing an enhanced risk of exposure *at their workplace*. 29 C.F.R. § 1910.1030(b) (Occupational Exposure definition). Extending the definition of "grave danger" to a risk that exists just as much, if not more so, outside the workplace would be truly novel and would "strain[ ] credulity." *Ala. Realtors*, 141 S. Ct. at 2486; *BST Holdings*, 2021 WL 5279381, at *15.

B. The Mandate does not address a "grave danger."

"The Agency cannot use its ETS powers as a stop-gap measure. This would allow it to displace its clear obligations to promulgate rules after public notice and opportunity for comment in any case, not just in those in which an ETS is necessary to avert grave danger." *Asbestos Info. Ass'n/North Am. v. OSHA*, 727 F.2d 415, 422 (5th Cir. 1984). "[T]he ETS statute is not to be used merely as an interim relief measure, but treated as an extraordinary power to be used only in 'limited situations' in which a grave danger exists, and then, to be 'delicately exercised.'" *Id*. OSHA must show that the spread of COVID-19 is a "grave danger" that requires it to implement the measure now rather than wait for the normal notice-and-comment procedure.

OSHA's assertion that the spread of COVID-19 is a "grave danger" that needs immediate attention is undermined by its own recent actions. First, "OSHA itself spent nearly two months" drafting its response to the "purported 'emergency.'" *BST Holdings*, 2021 WL 5279381, at *9. Also, just a few months ago, OSHA evaluated this exact same hazard—whether COVID-19 presents a grave danger to all covered workplaces—and came to the opposite conclusion: that only workplaces providing healthcare services faced enough "grave danger" to warrant an ETS. 86 Fed. Reg. 32,376 (June 21, 2021). This was not simply an oversight: OSHA explicitly considered—and rejected—proposals to apply the June 21 ETS beyond healthcare.[12] Furthermore, though emergency use authorization vaccines were in widespread circulation, there was no mandate for those on the front lines of fighting the pandemic. That OSHA concluded just a few months ago that all workplaces did *not* face a "grave danger" undermines its recent claim that the situation has changed today. The Fifth Circuit correctly concluded that OSHA is really attempting to use the Mandate as an interim relief measure—exactly the reason courts have said OSHA may not implement an ETS.

C. The Mandate is not "necessary."

For an ETS to survive judicial scrutiny, it must "be 'necessary' to alleviate employees' exposure to gravely dangerous hazards in the workplace." *BST Holdings*, 2021 WL 5279381, at *11 (citing *Fla. Peach Growers Ass'n v. U.S. Dep't of Labor*, 489 F.2d 120, 130 (5th Cir. 1974)). That means OSHA must consider other potential rules to address the proposed harm and show that

[12] Noam Scheiber, *OSHA issues a new Covid safety rule, but only for the health care industry*, N.Y. Times (June 10, 2021), https://www.nytimes.com/2021/06/10/business/economy/osha-covid-rule.html ("[Labor Secretary Marty] Walsh indicated that the risks to most workers outside health care had eased as cases had fallen and vaccination rates had risen.")

they are inadequate. *Asbestos Info.*, 727 F.2d at 426. OSHA failed to do so here and failed to engage in the narrow tailoring required of an ETS. Instead, the White House wanted the broadest possible mandate, and the ETS delivered. The Mandate represents "the rare government pronouncement that is both overinclusive . . . *and* underinclusive." *BST Holdings*, 2021 WL 5279381, at *8-9 (emphasis in original).

The Mandate is overinclusive because it applies to employees across the board, regardless of age, existing immunity, health, or location of one's work. The risks of obtaining COVID-19 vary depending on several factors OSHA does not consider.[13] Also, OSHA did not consider different rules based on how workplaces are arranged. For example, the Mandate is overinclusive in applying to Applicants Dailey, Gamble, Jones, and Reyna, who work mostly on roofs and only briefly interact with customers. Dailey Decl., Emer. Mot. Ex. C, ¶¶4, 6-7 (5th Cir., No. 21-60845); Gamble Decl., Emer. Mot. Ex. D, ¶¶4, 6-7 (5th Cir., No. 21-60845); Jones Decl., Emer. Mot. Ex. E, ¶¶4, 6-7 (5th Cir., No. 21-60845); Loschen Decl., Emer. Mot. Ex. F, ¶¶5-6 (5th Cir., No. 21-60845); Reyna Decl., Emer. Mot. Ex. G, ¶¶4, 6-7 (5th Cir., No. 21-60845); Stovall Decl., Emer. Mot. Ex. H, ¶¶6-7 (5th Cir., No. 21-60845); Luddy Decl., Emer. Mot. Ex. I, ¶¶4-8 (5th Cir., No. 21-60845). Indeed, "'no standard that covers all of the Nation's workers would protect all those workers equally.'" *BST Holdings*, 2021 WL 5279381, at *19 (quoting Letter from Loren Sweatt, Principal Deputy Assistant Sec'y, OSHA, to Richard L. Trumka, President, AFL-CIO, at 9 (May

[13] *See, e.g.,* CDC, COVID-19 Risks and Vaccine Information for Older Adults (Aug. 2, 2021), https://www.cdc.gov/aging/covid19/covid19-older-adults.html.

29, 2020)). Because the Mandate does not consider the different degrees of risk associated with differing workplaces it cannot be considered "necessary" for *all* workplaces.

The Mandate is underinclusive because it "purport[s] to save employees with 99 or more coworkers from a 'grave danger' in the workplace, while making no attempt to shield employees with 98 or fewer coworkers from the very same threat." *BST Holdings*, 2021 WL 5279381, at *9. "The reason . . . , as even OSHA admits, [is only that] companies of 100 or more employers will be better able to administer (and sustain) the Mandate." *Id*. at *19 (citing 86 Fed. Reg. 61,402-03). The Mandate is also underinclusive because even vaccinated people may be infected and transmit the disease to others, yet they are relieved from the mask requirement.[14] Further, unvaccinated workers could obtain and spread the virus between their weekly tests. Thus, "[t]he underinclusive nature of the Mandate implies that the Mandate's true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary." *Id*. at *20.

D. COVID-19 is not a "toxic or physically harmful" "substance" or "agent."

OSHA claims that COVID-19 is a toxic or physically harmful agent and a new hazard. 86 Fed. Reg. 61,408. Yet the natural reading of the term "toxic or physically harmful agent" does not include viruses.[15] It should be no surprise that "[t]he majority of OSHA's previous ETSs addressed toxic substances that had been familiar to the agency for many years prior to issuance of the ETS."

---

[14] Laurel Wamsley, *Vaccinated People with Breakthrough Infections Can Spread the Delta Variant, CDC Says*, NPR (July 31, 2021), https://www.npr.org/sections/coronavirus-live-updates/2021/07/30/1022867219/cdc-study-provincetown-delta-vaccinated-breakthrough-mask-guidance.

[15] Larkin & Badger, *The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for COVID-19 Vaccinations* (Oct. 3, 2021), SSRN: https://ssrn.com/abstract=3935420 at 11.

86 Fed. Reg. 61,408. The Sixth Circuit panel relied on definition 2b from Merriam-Webster, which defines "agent" as "a chemically, physically, or biologically active principle." *MCP No. 165 Panel, at* *10, App. 079 (quoting Merriam-Webster[16]). But Merriam-Webster defines "principle" as "an ingredient (such as a chemical) that exhibits or imparts a characteristic quality."[17] And an "ingredient" is "something that enters into a compound or is a component part of any combination or mixture."[18] It is, thus, not a virus.

According to the Oxford Advanced American Dictionary, an "agent" is "a chemical or a substance that produces an effect or a change or is used for a particular purpose."[19] Thus, in the context of the Act, "agent" means a substance that is "used for a particular purpose" in the workplace. The statute was meant to protect workers from the substances with which they are working; it does not allow the Secretary to mandate a vaccine on 84 million American workers. *See* 86 Fed. Reg. 61,468.

Further, OSHA cannot attempt to shoehorn an infectious disease into the phrase "new hazards." As the Fifth Circuit pointed out, "To avoid 'giving unintended breadth to the Acts of Congress,' courts 'rely on the principle of *noscitur a sociis*—a word is known by the company it keeps.'" *BST Holdings*, 2021 WL 5279381, at *11 (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015) (cleaned up)); *see also Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 163

---

[16] https://www.merriam-webster.com/dictionary/agent.
[17] https://www.merriam-webster.com/dictionary/principle.
[18] https://www.merriam-webster.com/dictionary/ingredient.
[19] https://www.oxfordlearnersdictionaries.com/us/definition/american_english/agent, at definition 5. Both this definition and the one from Merriam Webster give the example of an "oxidizing agent," which is used for a particular purpose at the workplace.

n.19 (2012) ("the canon of ejusdem generis limits general terms that follow specific ones to matters similar to those specified") (cleaned up).

The Sixth Circuit panel incorrectly claimed OSHA received statutory authority for mandatory immunizations in 29 U.S.C. § 669(a)(5). *MCP No. 165 Panel, at* *11, App. 080. But the statute says no such thing. It authorizes a different secretary—of Health and Human Services—to establish medical tests and record keeping necessary to track occupational illnesses. 29 U.S.C. § 669(a)(5). The word "immunization" appears only in a *prohibition* on mandating medical care for religious objectors as part of the kind of *research activities* discussed in the subsection in which it appears. *Id*. The Sixth Circuit panel turned an express statutory prohibition into evidence of authority. That Congress thought it necessary to ban forced immunization when authorizing HHS's research activities does not mean it granted the Department of Labor such authority when regulating. If anything, it shows that Congress knows how to address immunization when it wants to, and it saw no need to do so in the relevant provisions of the Act.

Finally, in searching for a basis for OSHA's authority, the Sixth Circuit panel had to reach out to other unrelated statutes by which Congress directed OSHA to deal with infectious disease. *MCP No. 165 Panel,* at *12, App 081. But the existence of specific statutory directives in other laws cuts the other way: the reason Congress needed to pass the Workers Family Protection Act or the Needlestick Safety and Prevention Act was because OSHA's pre-existing authority was insufficient. If OSHA had the kind of broad, unlimited authority claimed here, those statutes would have been redundant.

Thus, the Mandate violates the letter of the law; it also violates the spirit of the law, as "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry." *Indus. Union Dep't*, 448 U.S. 607, 651 (1980). The Sixth Circuit interpretation of the Act would allow just such unbridled power.

III. This Court should issue a stay because the Mandate violates the U.S. Constitution

A. The Mandate violates the Commerce Clause.

The panel dismisses Petitioners' Commerce Clause challenge by holding that "the ETS regulates employers with more than 100 employees, not individuals." *MCP No. 165 Panel,* at *32, App. 101. However, Petitioners' serious constitutional challenge does not merit such a terse dismissal. As Justice Bush observed in his dissent from denial of initial hearing en banc, "OSHA's theory of the commerce power [which was adopted by the panel] is … even more extravagant than what [this Court] has already rejected." *MCP No. 165 En Banc,* at *37, App 063.; *see also BST Holdings,* 2021 WL 5279381, at *8 (emphasis original) (the mandate presents "grave statutory and constitutional issues," and "[is] not—and likely could not be, under the Commerce Clause and nondelegation doctrine—intended to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways.").

1. The panel decision contradicts this Court's Commerce Clause Jurisprudence.

As shown below, the panel decision directly contradicts this Court's longstanding Commerce Clause jurisprudence by failing to address this Court's well-established test for reviewing

claims of federal power under the Commerce and Necessary and Proper Clauses and creating a general federal police power—an idea that this Court has regularly rejected.

The panel ruled that the Mandate "regulates economic activity by regulating employers" and therefore is within Congress's Commerce Power. *MCP No. 165 Panel,* at *32–34, App. 101–03. But this Court long ago rejected such a cavalier approach to the Commerce Power in favor of a multi-consideration approach. There are three categories of activities that fall within the Commerce Clause. The first two are those involving "the channels of interstate commerce" and those involving the "instrumentalities of interstate commerce[.]" *Lopez*, 514 U.S. at 558-59. The first two *Lopez* categories are not at issue. The Mandate does not regulate the channels of interstate commerce nor the instrumentalities of interstate commerce. It regulates the private healthcare decisions of employees—whether or not *intrastate*. The Mandate therefore can be justified, if at all, only under the third category, which applies at those activities "having a substantial relation to interstate commerce…i.e., those activities that substantially affect interstate commerce." *Id*. This "special effects test" is related to the Commerce Power, but is derived from the Necessary and Proper Clause, not the Commerce Clause alone. *See Gonzales v. Raich*, 545 U.S. 1, 5, 22 (2005); *id.* at 34 (Scalia, J., concurring).[20]

In *United States v. Morrison,* 529 U.S. 598 (2000), this Court laid out four considerations that, at a minimum,[21] courts should evaluate when applying the substantial effects test: (1) the

---

[20] *See* Petitioner LeadingEdge's Stay Motion in the Fifth Circuit, 10-12, 17-20 (Attached as Ex. 1); *see also Terkel v. CDC*, 521 F. Supp. 3d 662, 670-72 (E.D. Tex. 2021).

[21] This list is not exhaustive. *Raich*, 545 U.S. at 39 (Scalia, J., concurring); *See NFIB v. Sebelius*, 567 U.S. 519, 560 (2012).

economic nature (or lack thereof) of the intrastate activity; (2) the presence of a jurisdictional element in the regulation, limiting its application to matters affecting interstate commerce; (3) findings concerning the effect that the activity has on interstate commerce; and (4) the degree of attenuation of the link between the regulated activity and its effect on interstate commerce. *Morrison*, 529 U.S. at 610-12. Instead of analyzing Applicants' challenge under this well-settled test, the panel decision completely ignores it, opting to apply pre-1980 case law. While the Commerce Clause allows the regulation of many work-related things, it does not allow the regulation of any work-related thing, because in our interconnected economy everything is work related. The panel's reliance on *United States v. Darby*, 312 U.S. 100 (1941), is particularly misplaced. *MCP No. 165 Panel,* at *32, App. 101. Cases subsequent to *Darby* have made clear that OSHA regulations are subject to the heightened multi-consideration approach articulated in *Lopez*/*Morrison*. *See, e.g.*, *United States v. Kung-Shou Ho*, 311 F.3d 589, 599 (5th Cir. 2002) (applying the four *Morrison* considerations to an OSHA regulation). More importantly, *Darby* did not make the broad holding that OSHA suggested below. *See Gen. Tobacco & Grocery v. Fleming*, 125 F.2d 596, 601 (6th Cir. 1942) (noting narrow scope of Darby).

Applying the correct standard, the Mandate fails under each of the *Morrison*/*Lopez* considerations. First, it targets intrastate noneconomic activity—the decision to go unvaccinated. Second, there is no limiting jurisdictional element. Third, the Mandate contains no findings *whatsoever* regarding interstate commerce or whether the Mandate is essential to some broader regulation of interstate commerce. And fourth, to the extent it makes a commerce argument at all, the Mandate requires the piling of inference upon inference to reach its conclusions regarding economic effects.

Yet, despite the fact that these arguments were squarely before the panel, the decision does not address any of them. This failure alone is a sufficient bases to reinstitute the stay of the Mandate until the merits of the constitutional claims can be fully considered by the lower court.

2. The panel decision's interpretation of the Commerce Clause would create a free-ranging federal police power, which this Court has regularly rejected.

The panel decision fails to identify any outer boundary for the Commerce Power, effectively creating a general federal police power that is not found in the powers enumerated to the federal government by the Constitution, and which this Court has routinely rejected. *See United States v. Lopez*, 514 U.S. 549, 566 (1995) (explaining that the Constitution "withhold[s] from Congress a plenary police power"); *id.* at 584 (Thomas, J., concurring) ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power[.]"); *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 536 ("Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'"). "[W]hat cannot be done directly cannot be done indirectly[,]" *Cummings v. Missouri*, 71 U.S. 277, 325 (1866), and this Court should reject the panel's invitation to adopt a radical theory of federal police power.

The panel decision waves any concerns about our federal system away as a "suggestion … that the federal and state regulatory powers over economic activity are mutually exclusive[.]" *MCP No. 165 Panel,* at *34, App. 103. That, of course, was not Applicants' contention. Rather, Applicants argued that the federal government cannot do indirectly what it cannot do directly, *Cummings v. Missouri*, 71 U.S. 277, 325 (1866), and allowing OSHA to mandate whatever private activity it

wants as long as it dresses it up as workplace safety regulations violates our Constitution's limitation on federal power. Under the panel's theory of federal power there is no inherent limiting principle. But, as Judge Sutton—and the seven judges who joined him— noted in his dissent from denial of en banc consideration, the authority claimed by OSHA would

> [e]xtend[] to all hazards that might affect employees at some point during the 16 hours of each weekday and the 48 hours of each weekend when they are not at work, whether the hazard arises from a coronavirus of one sort or another, a virulent flu, traffic safety, air pollution, vandalism, or some other risk to which people are equally exposed at work and outside of work. It is one thing to tell a worker to don a mask at the start of a hazard-filled shift and doff it at the end. It is quite another to tell a worker to vaccinate on the basis of a risk that exists whether he is on the clock or off and that amounts to a medical procedure that cannot be removed at the end of the shift.

MCP No. 165 En Banc, at *26, App. 052. This theory would subject all manner of private non-economic activities, including intimate medical decisions, to federal regulation.

For example, hepatitis is a highly contagious disease. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993). OSHA has therefore adopted workplace safety protocols for healthcare facilities to protect healthcare workers from transmission. *Id*. But hepatitis may also be transmitted through unprotected sex. A healthcare employee's decision to have unprotected sex in his own home could therefore increase his risk of infection and therefore the risk that individuals in his workplace are exposed to hepatitis. By the panel's logic, this tangential relationship to workplace safety converts that worker's intimate choices into "economic activities" subject to federal regulation. Likewise, poor sleep can also detract from workplace safety. And as any parent knows, allowing one's child to crawl into bed with you if she has a nightmare can affect one's quality of

sleep. Under OSHA's conception of federal power, that parenting decision would become subject to federal regulation simply because of its downstream effects on workplace safety.

The panel's decision to take an unlimited view of Congress's power under the Commerce Clause is against the weight of history, precedent, and our Constitution's federal design.

B. OSHA's interpretation of the ETS statute also violates the nondelegation doctrine.

The panel decision similarly failed to apply this Court's precedents regarding the nondelegation doctrine, which the Fifth Circuit cited as a probable basis for holding the Mandate unconstitutional. *BST Holdings*, 2021 WL 5279381, at *8. Consistent with the Constitution's mandate that "[a]ll legislative power" is vested in Congress, U.S. Const. art I. § 1, Congress "may not transfer to another branch powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (internal quotations marks omitted). The nondelegation doctrine is rooted in separation-of-powers principles. Maintaining this "separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989). Accordingly, Congress cannot "merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). The ETS statute does exactly this, because it gives OSHA the power to write laws, but does not define key terms, provide a policy, or give the Secretary of Labor meaningful boundaries.

1. The Mandate is a legislative act.

The power to determine the "legislative policy and its formulation and promulgation as a defined and binding conduct" is legislative. *Yakus v. United States*, 321 U.S. 414, 424 (1944).

OSHA itself refers to its determinations regarding the Mandate as "essentially legislative." 86 Fed. Reg. at 61,403. The statute allegedly giving OSHA authority to issue ETSs is capacious. It allows OSHA to bypass normal rulemaking procedures if it determines "employees are exposed to grave danger" from "substances," agents," or "new hazards," and that an ETS is "necessary to protect employees from" that danger. 29 U.S.C. § 655(c). Here, the President set the legislative policy of "substantially increase[ing] the number of Americans covered by vaccination requirements,"[22] and then set binding rules, effectively immediately, and enforced with the threat of large fines. That is a legislative act.

2. The Mandate contains no "intelligible principle."

Delegations of legislative authority are only permissible when Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Gundy*, 139 S. Ct. at 2123 (quoting *J.W. Hampton & Co. v. United States*, 276 U.S. at 409) (alteration in original). This requires a statute to "clearly delineate[] a general policy, the public agency which is to apply it, and the boundaries of the this delegated authority." *Mistretta*, 488 U.S. at 372-73 (quoting *American Power & Light Co. v. Securities & Exchange Comm'n*, 329 U.S. 90, 105 (1946)). Tellingly, in its analysis of the nondelegation doctrine, the panel decision fails to articulate the "general policy" of the ETS statute. *MCP No. 165 Panel,* at *36, App. 105. Congress's failure to provide a general policy and failing to

[22] *Path Out of the Pandemic,* The White House, https://www.whitehouse.gov/covidplan/ (last visited Sept. 22, 2021).

delineate the boundaries of OSHA's delegation removes our "greatest security against tyranny—the accumulation of excessive authority in a single branch." *Mistretta*, 488 U.S. at 381.

There is no intelligible principle here for at least three reasons. First, key words and phrases in the statute are not defined. Congress provided no guidance on what is to be considered a "grave danger," whether a virus constitutes a "substance or agent," nor whether an illness that has been known about and spreading through the general public for almost two years is a "new hazard." Second, the Act does not give OSHA meaningful boundaries for deciding what is "necessary to protect employees," and it allows the rule to go into effect without a notice-and-comment rule-making procedure.[23] *Id.* Third, the authority claimed by OSHA is grossly disproportionate to the amount of guidance provided by Congress. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). Such a statute is "delegation running riot." *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

a. Congress's failure to define key terms gives the Secretary unfettered discretion to trigger an ETS.

The boundaries of the executive's authority to issue an ETS are not meaningfully limited, because the statute fails to define key terms or at least provide guidance to interpret them. *See Schechter Poultry*, 295 U.S. at 531–35; *Whitman*, 531 U.S. at 475 ("While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,'

[23] A notice and comment procedure only occurs *after* the ETS has been published and taken effect. 29 U.S.C. § 655(c)(3).

which are to be exempt from new-stationary-source regulations governing grain elevators, see § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy."). Unlike the country elevator example from *Whitman*, the meaning of grave danger, substances or agents, and new hazards are vital in determining whether the Secretary can trigger the need for a nationwide ETS. It is not clear that COVID-19 falls under any of those terms, and Congress provided no guidance to determine whether it does. By failing to provide any guidance as to what it meant by these terms, Congress has merely expressed "vague aspirations" and left the Secretary with virtually unlimited discretion to decide whether the requisite conditions for an ETS exists. Such a broad delegation undermines our constitutional design for the separation of powers and gives the Secretary unguided discretion in claiming more power for herself. Not only does this not prevent the accumulation of excessive authority in one branch, it gives the Secretary the unrestrained authority to give herself more authority. To allow such a delegation would be to completely undermine the Constitution's arrangement of authority among the branches.

b. Congress's failure to provide guidance to determine what is "necessary to protect" also does nothing to confine the Secretary's discretion.

In order to comply with the nondelegation doctrine, Congress must provide "boundaries [for its] delegated authority." *Mistretta*, 488 U.S. at 372–73 (quoting *American Power*, 329 U.S. at 105). In doing so, it must "meaningfully constrain[]" the Executive's discretion. *See Touby v. United States*, 500 U.S. 160, 166 (1991). Here, Congress failed to provide any guidance as to what it meant by "necessary to protect employees," leaving the statute devoid of any meaningful standard to confine the Secretary's discretion.

Consider two instances where this Court found a statute to be lacking an intelligible principle, it characterized the relevant statutes as Congress "fail[ing] to articulate *any* policy or standard' to confine discretion." *Gundy*, 139 S. Ct. at 2129 (quoting *Mistretta*, 488 U.S. at 373 n.7) (emphasis in *Gundy*). In one of those instances, *Schechter Poultry*, 295 U.S. at 538, the Court struck down a statute giving the President the power to make codes of fair competition—an undefined term—but did not limit his discretion in any meaningful way because it did not limit the scope of the codes and he could approve or disapprove of industry suggestions "as he may see fit." His only charge was to make sure the proposed codes were not "designed to promote monopolies or to eliminate or oppress small enterprises." *Schechter Poultry*, 295 U.S. at 538. This "unfettered" ability to approve and prescribe codes that affected trade and industry throughout the country is an unconstitutional delegation of legislative power.[24] *Id.* at 541–42; *see also Panama Refining Co. v. Ryan*, 293 U.S. 38, 430 (1935) ("As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.").

The requirement that the ETS be "necessary" to protect employees from the state emergency is inadequate under the nondelegation doctrine. Other than that one word, there is no constraint on the Secretary's discretion. This distinguishes the ETS statute from statutes like the one this Court considered in *Touby*, where the Attorney General could temporarily schedule a drug—

[24] Like the OSHA statute, the statute at issue in *Schechter Poultry* also did not include a procedure for notice and a hearing with the agency. 295 U.S. at 533–34.

after a 30-day notice—if he finds "doing so is 'necessary to avoid an imminent hazard to the public safety.'" 500 U.S. 160, 166 (1991) (quoting 21 U.S.C. § 811(h)(1)). There, the court held "multiple specific restrictions," *id.* at 167, found in the statute appropriately limited the Attorney General's discretion. No similar restrictions exist in the ETS statute.

Rather than providing specific guidelines in determining necessity, Congress left the Secretary unrestricted in the use of her discretion. She additionally has the power to publish the ETS to take effect immediately without any procedure for notice-and-comment rulemaking. These compound the separation of power problem present in the Act's failure to confine key terms. The result is a situation where the Secretary has the unfettered authority to claim more authority, and then unfettered discretion to determine whether the rule she wrote is "necessary" to carry out her claimed authority. Instead of providing meaningful boundaries, the Act leaves the Secretary without any meaningful boundaries to confine her discretion when publishing an ETS, a quintessential violation of the nondelegation doctrine.

c. The Secretary is claiming authority that is vastly disproportionate to the amount of statutory guidance.

Additionally, the more authority a statute gives to an agency, the less discretion in how to wield it is acceptable. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *see Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) ("If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people."). "Narrow, interstitial delegations of authority" are acceptable, *United States v. Melger-Diaz*,

2 F.4th 1263, 1267 (9th Cir. 2021), but Congress "must provide substantial guidance" when giving the Executive to set "standards that effect the entire national economy," *Whitman*, 531 U.S. at 475. As Judge Larsen correctly noted in dissent below, "Here, the Secretary asks for maximum authority *and* maximum discretion; he wants to issue a rule of national import, covering two-thirds of American workers, and he wants to do it without clear congressional authorization, without even public notice and comment, and with a capacious understanding of necessity." *MCP No. 165 Panel,* at *55, App. 124 (alteration in original). Such an exercise of power is "unprecedented." *Id.*

This principle is also evident when Congress delegates legislative authority to branches that have independent authority over the subject matter. *Loving v. United States*, 517 U.S. 748, 772-73; *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). Delegating discretion within a narrow scope or delegating authority where a coequal branch already has independent authority does not signal the separation-of-power problem that the nondelegation doctrine seeks to prevent. But that is not the situation here, where OSHA is claiming that the Act confers to the Executive the power to order 80 million Americans to inject themselves with an irreversible vaccine, under threat of losing their livelihood, without any independent constitutional grant of power. It is difficult to conceive of a more sweeping claim of authority than this. Extraordinary claims require extraordinary proof, and here, there is very little evidence that Congress properly delegated to the Executive to issue *this* kind of directive under *this* rarely used, rarely upheld Act.

CONCLUSION

For the forgoing reasons, this Court should grant the application for emergency relief and issue a stay of the Mandate pending review on the merits.

December 18, 2021

Respectfully submitted,

s/ Daniel R. Suhr

Daniel R. Suhr
M. E. Buck Dougherty III
Liberty Justice Center
141 W. Jackson Blvd., Ste. 1065
Chicago, IL 60604
Telephone: 312-637-2280
dsuhr@libertyjusticecenter.org
bdougherty@libertyjusticecenter.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: 504-952-8016
sarah@pelicaninstitute.org

Attorneys for BST Applicants

Matthew R. Miller
Robert Henneke
Chance Weldon
Nate Curtisi
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701
(512) 472-2700
Attorneys for Burnett Specialists; Choice Staffing, LLC; Staff Force Inc.; and LeadingEdge Personnel, ltd.

Gene P. Hamilton
Vice President & General Counsel
America First Legal Foundation
300 Independence Avenue SE
Washington, D.C. 20003
(202) 964-3721
R. Shawn Gunnarson
Kirton McConkie
36 South State Street, Suite 1900
Salt Lake City, Utah 84111

(801) 328-3600
Additional Counsel for LeadingEdge Personnel Services, Ltd.